

M e m o r a n d u m**245.0390**

To: Mr. G. D. Seames
Headquarters – Return Review Section

Date: February 6, 1991

From: Elizabeth Abreu
Tax Counsel

Subject: [X]

In your memorandum dated December 11, 1990, you requested our opinion concerning the treatment of flowers as food products. This issue arose during your review of [X] sales and use tax return for the fiscal year ending June 30, 1990 in which they claimed a large deduction for nontaxable sales of food products. You determined that part of the amount deducted represents gross receipts from the sales of flowers.

According to [X] in her letter dated November 28, 1990, she sells culinary herbs and edible flowers as complements to gourmet vegetable plants. She asserts that all are part of the “New California Cuisine,” a popular style of cooking and a marketing strategy which she has found useful. She enclosed copies of several magazine articles extolling the lavish use of edible flowers in salads, soups, pastas, sauces, sherbet, etc.

There are two possible bases for the exemption. The first arises under sections 6351 and 6358(c) of the Revenue and Taxation Code which exempt from sales tax the gross receipts from sales of seeds and annual plants the products of which “ordinarily constitute food for human consumption.” However, despite the innovative use of flowers as part of the meal rather than decor by chefs in Berkeley and British Columbia, in our opinion flowers do not ordinarily constitute food for human consumption. Therefore, the sales of edible annual flowers are not eligible for this exemption.

The second possible basis is section 6359(a) of the Revenue and Taxation Code which exempts from sales tax the gross receipts from the sale of food products for human consumption. Neither this statute, Regulation 1602, nor annotation 245.1320 list edible flowers as food products. Section 6359(b) specifically provides that food products include “vegetables and vegetable products” and “fruits and fruit products” but does not list edible flowers as a food product. The fact that an item is edible does not by itself make the item a food product. Luer Packing Company v. State Board of Equalization, (1950) 101 Cal.App. 2d 99.

Since flowers are ordinarily used in gardens or for decoration and not for human consumption and since the legislature did not include edible flowers in the list of food products in section 6359, it is our opinion that the food product exemption does not apply. Therefore, sales of edible flowers are taxable sales.

If you need further assistance on this matter, please do not hesitate to ask.

EA:cs